IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-582

NORFOLK AND WESTERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, WALKER TOWING CORPORATION, HUFFMAN TOWING COMPANY, INLAND WATERWAYS, INC., FEDERAL BARGE LINES, INC. and INLAND TUGS CO.
Appellants,

v.

THE HONORABLE WILLIAM L. BEATTY, VICTOR J. MOSELE, JOHN GITCHOFF, HAROLD R. CLARK, JOSEPH J. BARR, FRED P. SCHUMAN, MOSES W. HARRISON, II and JOHN D. LAURENTI, Judges,
Appellees,

On Appeal From the United States District Court for the Southern District of Illinois, Southern Division

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JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Illinois, Southern Division (App. A, infra. pp. A-1-A-5) has not yet been reported at the time this Jurisdictional Statement was printed.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Appellants filed this action in the District Court for the Southern District of Illinois, Southern Division, seeking to enjoin appellees, the Judges of the Third Judicial Circuit Court of Madison County, Illinois from infringing their constitutional rights. Appellees are applying § 707, Ch. 110 A, Ill. Rev. Stats. to prohibit appellants from having specialist counsel, licensed in states other than Illinois, conduct the trial of suits brought against appellants, in the state court, by their employees in the exercise of rights created by federal statutes and admiralty and maritime law. This action was taken despite the fact that appellants had also employed, in the cases, Illinois licensed attorneys as local counsel, who appeared at all stages of the proceedings.

Federal jurisdiction is based on the existence of a federal question, 28 U.S.C. § 1331, and on diversity of citizenship, 28 U.S.C. § 1332. As an action to restrain, on constitutional grounds, state officers from enforcing a state statute, the proceeding is brought under the authority of 28 U.S.C. §§ 2281 and 2284.

(ii) The judgment or decision sought to be reviewed is the Order entered on July 2, 1975, by a three-judge court convened pursuant to 28 U.S.C. §§ 2281 and 2284, holding that § 707, Ch. 110 A, Ill. Rev. Stats. was not constitutionally deficient as applied to appellants. (App. A. infra pp. A-1-A-5) On May 10, 1975, an order had been entered that the three-judge court had jurisdiction. No post-judgment motions were filed. The Notice of Appeal (App. B. infra pp. A-6-A-10) was filed in the District Court for the Southern District of Illinois, Southern Division, on August 21, 1975.

(iii) Jurisdiction of this Court to review the decision of the federal court on direct appeal is conferred by 28 U.S.C. § 1253.

(iv) Cases sustaining the jurisdiction of this Court are:

Turner v. Fouche, 396 U.S. 346 (1970);

Flast v. Cohen, 392 U.S. 83 (1968);

City of Cleveland v. United States, 323 U.S. 329 (1945);

Query v. United States, 316 U.S. 486 (1942).

(v) The validity of § 707, Ch. 110 A, Ill. Rev. Stats., as applied to restrict and deny appellants the effective assistance of counsel of their choice, in defending suits brought to enforce rights under federal statutes, is here involved. The full text of that Section is as follows:

Illinois Revised Statutes, Chapter 110 A, Section 707: *("Supreme Court Rule 707). Foreign Attorneys in Isolated Cases.*

> "Anything in these rules to the contrary notwithstanding, an attorney and counselor-at-law from any other jurisdiction in the United States, or foreign country, may in the discretion of any court of this State be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he is employed."

QUESTIONS PRESENTED BY THE APPEAL

For many years, a substantial number of suits asserting rights under federal statutes (The Federal Employers' Liability Act [F.E.L.A.] 45 U.S.C. § 51, et seq., The Safety Appliance Acts 45 U.S.C. § 1-50, The Merchant Marine Act of 1920, as

amended [Jones Act] 46 U.S.C. § 688) and under maritime law, have been brought against appellants in the Circuit Court of Madison County, Illinois, without regard to where the accident occurred, or the residence of the plaintiff. Under the law, the plaintiff has the option to sue in the state court of any state in which his employer does business; and the action may not be removed to the federal court. Appellants have been represented in such cases by specialist attorneys, licensed in states other than Illinois, to conduct the trial of such cases, with Illinois licensed attorneys employed as local counsel and appearing in court at all stages of the proceeding. This case arose when appellees, Judges of the Madison County Circuit Court, applying § 707, Ch. 110 A, Ill. Rev. Stats., struck the names of specialist, non-resident counsel as trial attorneys and ordered appellants to retain Illinois licensed attorneys who alone would actually try the cases.

The question presented is whether §707, Ch. 110 A, Ill. Rev. Stats, as applied to appellants in restricting and interfering with their right to the effective assistance of counsel of their choice, and with the right of such counsel, is in conflict with the Constitution of the United States, specifically:

1. The Supremacy Clause in ARTICLE VI, by attempting to regulate basic rights and impairing the uniformity of rights created by the federal statutes and maritime law?

2. The equal protection, due process and privileges and immunities clauses of the Fourteenth Amendment?

3. The Commerce Clause, ARTICLE I, Section 8, by laying an undue burden and discriminating against interstate commerce?

STATEMENT OF THE CASE

Appellants are two railroad and five barge line companies engaged in interstate commerce by rail and water in many states, including Illinois. Acts of Congress (Federal Employers' Liability Act [F.E.L.A.], 45 U.S.C. §51 et seq. and The Safety Appliance Acts, 45 U.S.C. §1-50) provide the railroad employees with federally created rights against the railroad appellants for job-related injuries; the rights of seamen employees against the barge line appellants are conferred by the Merchant Marine Act of 1920, as amended (Jones Act), 46 U.S.C. §688, and admiralty or maritime law. Concurrent jurisdiction is conferred upon federal and state courts (45 U.S.C. §56, 46 U.S.C. §688). Venue may be had wherever the defendant transacts business (*Pure Oil Co. v. Suarez*, 384 U.S. 202 [1966]; 45 U.S.C. §56). Actions filed in the state court may not be removed to the federal court (28 U.S.C. §1445(a)).

For many years, a substantial number of suits against appellants by employees to recover damages for injuries, have been filed in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. In a large number of such cases, the alleged accidents did not occur in Illinois. The plaintiff, the occurrence witnesses, and the treating or examining physicians were not residents of Illinois; and the hospital involved was not located in Illinois. Appellants are incorporated and have their principal offices in states other than Illinois. In fact, the only point of contact with the state of Illinois, in such cases, is that suit was filed in Madison County and service was obtained upon appellants in Illinois, because of their operations in interstate commerce.

Appellant railroads have retained certain lawyers specializing in F.E.L.A. matters, and the barge line appellants have retained specialist admiralty counsel to handle these cases. These lawyers maintain their offices in St. Louis, Missouri, which imme-

diately adjoins Madison County, Illinois. They are licensed to practice law by the state of Missouri and have been admitted to the bar of various federal district and appellate courts. They are not licensed to practice law by the State of Illinois, but appear and have appeared, in Illinois state courts only in connection with their railroad or admiralty specialties. Appellants have employed these attorneys to investigate the accident, evaluate the claims and advise regarding possible settlement; and, if necessary, to prepare and try the lawsuits. In every such suit, appellants have also employed lawyers, licensed by the state of Illinois to act as local counsel, to appear in court at all stages of the proceeding.

On March 19, 1975, appellees, Madison County Circuit Judges advised that, effective immediately, pursuant to §707, Chap. 110 A, Ill. Rev. Stats., appellants would be prohibited from using their specialist attorneys to conduct the trial in any pending case, including those already prepared by them and ready for trial. Appellants were ordered to employ Illinois licensed attorneys to try the cases.

On March 31, 1975, appellants filed in the United States District Court for the Southern District of Illinois, Southern Division, a complaint for injunction pursuant to §§2281 and 2284, 28 U.S.C., challenging the constitutionality of §707, Ch. 110 A, Ill. Rev. Stats., as applied by appellees. They prayed that a three-judge court be impaneled to hear the case; asked for a temporary restraining order; and that, thereafter, a preliminary injunction issue, restraining appellees from enforcing the above statute, as applied to appellants, pending final hearing; and that, on final hearing the injunction be made permanent and for further relief as appropriate.

Pursuant to notice, 28 U.S.C. §2284 (2), a hearing was held on March 31, 1975 before the Honorable Harlington Wood, Jr., District Judge, to determine whether or not a temporary

restraining order should be issued. The parties appeared through their attorneys and one of the appellees, Judge Beatty, testified. At the conclusion of the hearing, the court took the matter under submission.

On April 1, 1975, Judge Wood requested Chief Judge Fairchild of the United States Court of Appeals for the Seventh Circuit to appoint a three-judge court to consider the case. Judge Walter J. Cummings, Judge, United States Court of Appeals, Judge Robert D. Morgan, Chief Judge of the Southern District of Illinois, and Judge Harlington Wood, Jr. were appointed as judges of the three-judge court. Briefs were requested, and submitted by appellants, appellees, and two amici curiae, the Illinois State Bar Association and the County Bar Association of Madison County, Illinois, on the issue of whether or not the three-judge court had jurisdiction. The Madison County Bar Association had petitioned the court, on behalf of its two hundred five (205) members, to intervene on the ground, among others, that the "question is one of general and vital interest to the members of the Madison County Bar Association" and "* * * that the outcome of this case will materially affect the livelihood and quality of practice by the members of the Madison County Bar Association."

While the application for temporary restraining order was under submission, appellee Beatty, on April 21, 1975 struck the appearance of Joseph A. Murphy, a Missouri attorney, as attorney of record for the appellant Inland Tugs Co., in a lawsuit pending against said company. On April 23, 1975, Inland Tugs Co. filed a new motion for a temporary restraining order, which was denied by Judge Wood on May 1, 1975. Thereafter, on May 3, 1975, appellant railroads, and, on May 8, 1975, appellant barge lines filed their respective motions for an immediate hearing on the preliminary injunction.

On May 10, 1975, the three-judge court ruled that it had jurisdiction of the case. The Court further noted that the pend-

ing motions for preliminary injunction would be taken with the case on the merits. No hearing on appellants' motion for preliminary injunction was held.

On May 22, 1975, an answer was filed by appellees which admitted the essential factual allegations of the complaint. On July 2, 1975, the court entered its order denying the relief sought by appellants and granting, as if it had been filed, appellees' motion to dismiss. Appellants thereafter filed their Notice of Appeal to this court on August 21, 1975, within the time allowed by 28 U.S.C. §2101(b).

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

This case, involving the imposition by a state of barriers against non-residents, raises important issues regarding the right to counsel of their choice of defendants in civil cases and the power of a state to prohibit or restrict participation of out-of-state specialist counsel, in cases asserting federally created rights. Under the guise of regulating the practice of law, Madison County Circuit Judges have barred appellants from having their specialist attorneys, licensed in states other than Illinois, conduct the trial of F.E.L.A. or Jones Act cases brought against them in the state court. No justification, other than the economic interest of the Madison County Bar, was suggested as a basis for appellees' action, which was taken notwithstanding:

(1) the fundamental unfairness to a civil defendant who does not choose the forum state, if he may not bring in the lawyer of his choice;

(2) the fact that appellants had also employed, as local counsel in every case, Illinois licensed attorneys, who appeared in court at all stages of the proceeding. Accordingly, the state's regulatory interest (in requiring knowledge of its practice and procedure, to assure the smooth administration of the state court system) was fully satisfied.

Unfortunately, state and local bar associations, particularly during periods of economic recession and concern over the impact of no-fault insurance on casualty litigation, encourage and perhaps stimulate restrictions of this type. They do so despite specific judicial reminders that "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse" (*Goldfarb v. Virginia State Bar*, 95 S. Ct. 2004, 2014 (1975); that the need "for specialized legal services frequently arises as to federal rights relating to such esoteric subjects as income taxation, patents, copyrights, trademarks and securities and labor regulation" (*Spanos v. Skouras Theatres Corporation*, 364 F.2d 161, 170 (2d Cir. 1966), as well as anti-trust, F.E.L.A., Jones Act, and admiralty matters; and the admonition of the American Bar Association in its Code of Professional Responsibility:

> "However the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitation upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice." (Canon 3, EC 3-9).

Of course, it is easier to apprehend unfairness when a black complains that his constitutional rights have been violated by state action, than when a similar claim is made by a railroad or barge line company. However, if the Constitution is in-

deed color blind, its provisions are designed to protect the rights of corporate defendants, as well. Federal law permits railroad workers and seamen to sue their employers in any state in which they operate; but it does not thereby sanction rules by the forum states, restricting the right of the non-resident defendants to assistance by counsel of their choice.

Unless checked by this Court, the action taken by appellees will discourage specialization by lawyers who necessarily represent their clients in many states on federal matters, despite the growing need for expertise in trial of lawsuits; lead to reprisals by the bar associations in other states and balkanize the legal system, impede the handling and settlement of F.E.L.A., Jones Act and maritime claims; and discriminate against, and impose undue burdens upon, rail and water carriers in interstate commerce. The precedents established by this Court require reversal of the decision below.

1. **The Supremacy Clause: Federally Created Rights Are Governed by Federal, Not State Law. Appellees' Order Violates Article VI of the Constitution.**

The decisions of this Court make it clear that substantive rights under federal statutes and maritime law are governed by federal law and may not be altered by state law (*Garrett v. Moore-McCormack Co.*, 317 U.S. 239 [1942]; *Brown v. Western Railway of Alabama*, 338 U.S. 294 [1949]). As stated in the *Garrett* case, 317 U.S. 239, 244-245:

> "* * * The source of the governing law applied is in the national, not the state, governments. If by its practice the state courts were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which

> Congress, by providing alternative remedies, intended to make not less, but more secure."

In Jones Act, maritime and F.E.L.A. cases, a state is not free to apply its rules of contributory negligence (*Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 [1953]; *Beadle v. Spencer*, 298 U.S. 124 [1936]; 45 U.S.C. §53), assumption of risk (*Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 [1939]; 45 U.S.C. §54); statute of limitations (*McAllister v. Magnolia Petroleum Company*, 357 U.S. 221 (1958); 45 U.S.C. §56); statute of frauds (*Kossick v. United Fruit Co.*, 365 U.S. 731 [1961], or its doctrines in testing the validity of releases. (*Garrett v. Moore-McCormack Co.*, 317 U.S. 239 [1942]; *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 [1952]. In fact, this Court has held that a state court cannot apply strict local rules of pleading or practice to impair the right of a railroad worker to recover in a F.E.L.A. action. (*Brown v. Western Railway of Alabama*, 338 U.S. 294 [1949]).

Surely, if a state lacks power to burden or impair a federal right by applying its rules of pleading to measure the adequacy of a Jones Act or F.E.L.A. complaint, its statute of frauds to nullify an oral agreement, its statute of limitations to outlaw a suit, or its legal doctrines to determine the validity of a release, it does not have the authority to prohibit a Jones Act or F.E.L.A. plaintiff or defendant from having his case tried by counsel of his choice, particularly when attorneys licensed in the forum state have been employed as local counsel. In a legal system, adversary in nature such as ours, where rights can be waived or lost unless asserted in a timely and effective manner, the right to counsel—essential for the protection of other rights—may well be the most basic right (*Powell v. Alabama*, 287 U.S. 45, 68-69 [1932]; *Gideon v. Wainwright*, 372 U.S. 342 344-345 [1963]). By prohibiting appellants' specialist counsel from trying cases and ordering appellants to employ Illinois licensed attorneys to try such cases, appellees have infringed appellants' substantive federal rights.

Appellants' out-of-state specialist counsel appear in many F.E.L.A. and Jones Act cases in the Madison County Circuit Court, not because they seek to deprive members of the Madison County Bar of their livelihood, but because this is a favorite plaintiff's forum. Although non-resident counsel may be termed "foreign" attorneys, at least under our federal system, they should not be treated as hostile invaders, fair targets for attack. When the enjoyment of rights created by an Act of Congress is impeded by the law of any state, the state rule must yield.

2. **Specialist Counsel Render Important Legal Services for Appellants.**

If appellees had applied § 707, Ch. 110A, Ill. Rev. Stats., to prohibit out-of-state counsel of plaintiff's choice from trying an F.E.L.A. or Jones Act case, there is little question but that such action would be held invalid—either as an impairment of a basic federal right or as a violation of Fourteenth Amendment rights. In a series of decisions, this Court has frustrated the efforts of states, acting by their state bar associations to regulate or restrict the selection of attorneys for injured claimants. (*United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 [1971]; *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 [1967]; *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 [1964]; see also *N.A.A.C.P. v. Button*, 371 U.S. 415 [1963]).

(A) **The Role of Counsel for Appellants.**

Assistance of counsel is no less important to an F.E.L.A. or Jones act defendant than to a plaintiff. Congress has made rail and water carriers subject to a system of federally created rights. Under these statutes, they are subject:

(1) To suit by employees in a state court, in any state in which they operate. Some of appellants can be sued in any one of more than twelve (12) states as a result of the same accident.

(2) To trial by jury, with sweeping federal changes in common law concepts of negligence and burden of proof requirements. Assumption of risk, contributory negligence and the fellow servant doctrine are not available as defenses.

(3) To liability virtually without fault in certain types of claims, such as violation of the Safety Appliance Act and unseaworthiness.

It is a matter of common knowledge that a jurisdiction with a reputation for high jury verdicts attracts an increased volume of personal injury suits. This Court has noted the history of this development as it related to the pattern of regional attorneys selected by the Brotherhood of Railroad Trainmen in F.E.L.A. cases. (*Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar*, 377 U.S. 1 [1964]; *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 [1971]). A growing number of F.E.L.A. and Jones Act suits has been filed against appellants in the Madison County Circuit Court in recent years.

In this situation, it has become increasingly important for appellants to promptly obtain the services of specialist F.E.L.A. or admiralty counsel. Retained often shortly after the casualty occurs and before suit is filed, they investigate the accident, evaluate the claim, and advise regarding, or handle, settlement negotiations. If suit is filed, they represent appellants, prepare and try the cases. So that state court procedures will be followed, attorneys licensed in the forum state are employed as local counsel and appear in court—along with specialist counsel—at all stages of the proceeding.

Appellants and their out-of-state attorneys have not invaded Madison County in search of a favorable forum. They are

brought there in response to suits filed by plaintiffs who could instead have filed the suits in Missouri, Louisiana, Kentucky, Arkansas, or any other state in which appellants do business. Until the suit is filed, appellants do not know what forum the plaintiff will select or, in fact, whether litigation will result. Many claims are settled with the assistance of specialist counsel.

(B) The Consequences of Application of § 707, Ch. 110 A, Ill. Rev. Stats.

The financial and frictional impact of appellees' action is manifest. If Illinois has the power as a forum state, to prohibit out-of-state lawyers from trying F.E.L.A. and Jones Act-Maritime lawsuits, every other state has the same authority as to such suits filed in that state.

Moreover, trial of a lawsuit is only one aspect of the legal services rendered in a lawsuit. Frequently, particularly in the many cases in Madison County filed by nonresident plaintiffs, for accidents which occurred in other states, depositions must be taken, witnesses interviewed and hospital records obtained in those other states. If appellees are permitted to apply § 707 as they wish, each state where legal services are performed, in a suit filed in Madison County, can require that only lawyers licensed in that state can take the depositions or perform the other legal services involved.

Perhaps, the state or local bar associations of other states would welcome such restrictions on out-of-state lawyers as "materially affecting the livelihood" of their members as has the Madison County Bar Association. However, as a matter of social policy in a federal system, such a balkanizing process demeans the profession, brings discredit upon the j dicial system, requires change of counsel, increases the cost and prevents clients from obtaining the quality of legal service to which they are entitled.

3. The Parties in Civil Cases Involving Federal Rights Are Entitled, Under the Constitution, to Assistance of Counsel of Their Choice.

There is a pressing need for clarification of the rights of clients to counsel of their choice and of the power of a state to regulate the practice of law in cases involving federal rights. Of course, this Court has spoken on the subject; in *Powell v. Alabama*, it said:

> "If in any case, civil or criminal a state or federal court were arbitrarily to refuse to hear a party by counsel employed by and appearing for him, it reasonably may not be doubted that such refusal would be a denial of a hearing and therefore, of due process in the constitutional sense." (287 U.S. 45, 69 [1932]).

This statement and the sweeping language in *Glasser v. U. S.*, 315 U.S. 60, 70 (1942):

> "the right to the assistance of counsel is so fundamental that denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing may so offend our concepts of the basic requirements of a fair hearing as to amount to a denial of due process of law"

have led federal courts to extend the Sixth Amendment right to counsel to include the right to retain counsel not authorized to practice in the district where trial was held (*U.S. v. Bergamo*, 154 F.2d 31 (3rd Cir. 1946); and to hold that a federal district court may not refuse to accept defendants' removal petition because it was not signed by a member of the Mississippi bar. (*Lefton v. City of Hattiesburg*, 333 F.2d 280 (5th Cir. 1964)). Said the court:

> "Moreover, where local counsel are associated in the case to comply with court rules, non-local counsel chosen by the

parties may nevertheless take the lead in the direction and argument of the case." (at p. 285)

In the area of civil cases, this Court has limited the power of states to regulate the practice of law and prohibit unauthorized practice, notwithstanding their interest in the conduct of the professions within their boundaries. State procedures for admission to practice and disbarment must be relevant to the qualifications involved and must not encroach upon the attorney's first amendment privileges (See *Konigsberg v. State Bar*, 353 U.S. 252 [1957]; *Schware v. Board of Bar Examiners*, 353 U.S. 232 [1957].) In *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), Virginia was restrained from prosecuting the Legal Defense Fund under laws prohibiting solicitation of legal business.

Moreover, this Court refused to permit the application of state laws forbidding solicitation and unauthorized practice to a labor union program of recommending attorneys to members and their families. (*United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 [1971]; *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 [1967]; *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 [1964]. As the Court stated in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest, and . . . of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge."

The "lawsuits authorized by Congress to effectuate a basic public interest" were, of course, F.E.L.A. claims, the same federal rights involved in this case. The union plan which was protected involved a system of regional or out-of-state counsel for

the claimants, a Chicago attorney for example representing defendants in Michigan and several other states.

From these decisions there emerges the general principle that state regulation of the legal profession is invalid "whenever it impedes the vindication of substantive federal rights" (Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 Colum. L. Rev. 731, 740).

In *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, cert. denied, 385 U.S. 987 (1966), the majority of the Second Circuit (7-2) en banc held that there was a constitutional right to the assistance of an out-of-state specialist attorney, associated with local counsel, in connection with a federal right of action. The court upheld the right of a California attorney to recover for legal services performed in New York in an anti-trust suit, despite a state law condemning the unlicensed practice of law, Judge Friendly's opinion for the court stated (at p. 170):

> "We are persuaded, however, that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgement must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him *to serve in whatever manner is most effective*, subject only to valid rules of courts as to practice before them." (emphasis ours.)

The court added (pp. 170-171):

> "If a corporation operating across state lines wishes a particular lawyer or firm of lawyers to supervise the handling of all its problems in one of such fields, we do not see how a state can constitutionally insist that a local manager come

to the expert, bearing bales of papers with him, rather than vice versa."

The court held that, under the privileges and immunities clause of the Constitution, New York could not prohibit an out-of-state attorney from rendering legal services within the state on a federal claim or defense; nor prevent his client from retaining him in association with an in-state lawyer.

4. **Section 707, Chap. 110A, Ill. Rev. Stats., as Applied by Appellees, Violates the Constitutional Rights of Appellants and Their Counsel.**

The court below rendered the order appealed from by granting a motion to dismiss appellant's complaint, as though such a motion had been filed. Accordingly, appellants are entitled to have the allegations of their complaint taken as true. The statement of the case, set forth above, includes these allegations, among others, which were admitted by appellees' answer:

(1) that appellants, defendants in many cases asserting federal rights and claiming damages in substantial amounts, have been prohibited by appellees from having the trial of such cases conducted by their out-of-state specialist attorneys, who have been trying such cases for many years, with in-state attorneys as local counsel.

(2) that appellants have been ordered to obtain Illinois licensed counsel to try such cases, and to proceed to trial, with specialist counsel (who have already prepared some of the cases for trial) being permitted to sit at the counsel table but without the right to address the court or jury.

(3) that there has been no suggestion of misconduct on the part of appellants' counsel. In fact, the contrary appears from the testimony of appellee, Judge Beatty, at the hearing on March 31, 1975.

(4) that appellees' order applied §707, Ch. 110 A., Ill. Rev. Stats. to bar appellants' specialist counsel from participating in trials. The statute gave appellees discretion for participation in trial by an out-of-state attorney, only in isolated cases; and some of appellants' counsel were counsel of record in twenty to thirty cases at the same time" (Answer, par. 23).

(A) The statute, as applied, violates the equal protection clause of the Fourteenth Amendment:

There has been no showing of substantive evils flowing from the activities of appellants' specialist counsel required to support the state's regulatory interest and justify the broad prohibition which appellees have imposed. (*N.A.A.C.P. v. Button, supra*). When the question litigated is federal, as here, the state's legitimate interest—in requiring knowledge of state practice and procedure and providing an attorney on whom all papers and orders can be served (to assure smooth administration of the state court system)—is completely satisfied by the employment by appellants, of Illinois-licensed attorneys as local attorneys. The ban on out-of-state counsel trying the case "would only be necessary to fulfill the parochial desire to eliminate outside competition." (Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 Colum. L.Rev. 731, 750 (1967).

This court has held that a state cannot infringe, in any way, the right "to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest". Accordingly, states have been denied power to regulate or restrict the selection of attorneys for F.E.L.A. plaintiffs. (*United Transportation Union v. State Bar of Michigan, United Mine Workers v. Illinois State Bar Association; Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, supra.*)

To permit the denial of the right of F.E.L.A., Jones Act and maritime defendants to have out-of-state counsel of their choice try cases brought against them, while so protecting the right of plaintiffs, is to establish a classification "without any reasonable basis", in violation of the equal protection clause of the Fourteenth Amendment. Since the challenged law directly impinges the exercise of a "fundamental" personal right (to the assistance of counsel of one's choice), the state must show that the law is necessary to promote a compelling governmental interest (*Dunn v. Blumstein*, 405 U.S. 330, 335, 342 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). None has been shown.

It will not do to suggest, as did the court below, that there is no real interference since out-of-state counsel are not completely barred at trial; their participation is simply limited—they can be in court but cannot talk to the court or jury. Although there are occasions in court when both wisdom and a client's interest suggest silence, counsel whose voice is stilled, whether by laryngitis or court order, is not an advocate at trial.

A classification which protects F.E.L.A. or Jones Act plaintiffs, but not defendants, has no rational basis relevant to the purpose for which the classification is made. (*Rinaldi v. Yeager*, 384 U.S. 305 [1966]). Moreover, section 707 establishes other irrational classifications, as well. As applied by appellees, out-of-state counsel may be permitted to try an isolated case; but there is no discretion vested in the court to permit appellants' counsel, who have been trying such cases in Madison County for many years, and against whom there has been no suggestion of misconduct, impropriety or lack of qualification. However, in terms of the legitimate interest of the state in the qualifications of counsel, if any distinction should be made between the two groups of out-of-state counsel, appellants' counsel should be entitled to preference.

Appellants' counsel, thus far, are barred by appellees only from trying the cases, but not from rendering other legal services in Illinois in connection therewith. Again, the basis for classification of services fails. If the state has any relevant disciplinary interest in guarding against professional misconduct, the court is in a far better position to observe, supervise, and punish misconduct in its presence at trial than at any other time.

Since §707, as applied by appellees establishing classifications without any reasonable basis, appellants' right to equal protection of the law has been denied.

(B) The statute, as applied, violates the due process clause of the Fourteenth Amendment.

The right to counsel in civil litigation is basic to the guarantee of a fair hearing. As noted, this Court, in *Powell v. Alabama*, 287 U. S. 45, 69 (1932), asserted that "it reasonably may not be doubted" that arbitrary refusal "in any case, civil or criminal," of a state or federal court to hear a party by counsel of his choice would be a denial of a hearing and of due process. A fair hearing is denied in criminal cases, when out-of-state counsel of defendant's choice is excluded without substantial justification. (*U. S. v. Bergamo*, 154 F.2d 31 (3rd Cir 1946); and the same rule should apply in civil cases under laws of the United States, particularly with regard to the civil defendant who does not choose the forum state.

This is the situation of appellants, who are sued in Madison County because their employees, under federal law, may choose counsel from other states and sue them wherever they operate. Frequently, they prefer this forum. Fundamental fairness is denied a party forced to litigate in another state, if he cannot bring in the lawyer of his choice to represent him in whatever

fashion he deems best. Since appellants, in every case, have retained a member of the Illinois bar as local counsel and have, in this manner, satisfied the proper interest of the state, "due process should require the admission of nonlocal counsel who is associated with a local attorney . . . in state court-federal question litigation". (Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 Colum. L.Rev. 731, 750 [1967]). The arbitrary refusal of appellees to permit appellants' specialist counsel to try F.E.L.A. and Jones Act cases brought against appellants in Madison County and the order (requiring the employment of new trial counsel for cases already prepared for trial by out-of-state counsel, involving duplication, waste and additional expense), deprives appellants of due process under the Fourteenth Amendment.

(C) **The statute, as applied, violates the privileges and immunities of appellants and their specialist counsel.**

In *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2nd Cir. 1966), discussed above, the Second Circuit en banc refused to apply a state law restricting out-of-state attorneys on the ground that such counsel were "necessary and appropriate" for the assertion of a federal right in anti-trust litigation. Therefore, there was a privilege and immunity safe-guarded by the Fourteenth Amendment. Since the need of appellants for out-of-state counsel is also tied to a federal claim and defense, under the decision in the *Spanos* case, the privileges and immunities of appellants and their specialist counsel, guaranteed by the Fourteenth Amendment, have been violated by § 707, as applied by appellees. The rights of the attorneys may be asserted by appellants in this proceeding. (*Griswold v. Connecticut*, 381 U.S. 479 [1965], *Truax v. Raich*, 239 U.S. 33 (1915)).

5. **The Statute, as Applied, Lays an Undue Burden on Interstate Commerce, in Violation of Article I § 8.**

In *Goldfarb v. Virginia State Bar*, 95 S. Ct. 2004 (1975), this Court held that performance of legal services, examining a land title, in exchange for a fee is commerce; and noted that, in the modern world, such activities by lawyers play an important part in commercial intercourse.

Of course, appellants, rail and water carriers, are directly involved in interstate commerce. The statute, as applied by appellees, bars appellants from having cases tried by out-of-state counsel who have already prepared some of the cases for trial. It requires appellants to employ locally licensed attorneys to try such cases, involving claims of employees in interstate commerce. In so doing, an undue burden is placed on interstate commerce, in violation of the Constitution. (*Pike v. Bruce Church, Inc.*, 397 U.S. 137 [1970]).

6. **The Opinion Below.**

There are serious issues in this case, which deserve careful consideration. It is submitted, with deference, that a reading will disclose that the opinion below falls far short of that standard. Granted, lawyers rarely, if ever, regard adverse rulings as models of the judicial craft. However, consider the fact that:

(1) The decisions of this Court in *N.A.A.C.P. v. Button*, *Brotherhood of Railroad Trainmen v. Virginia*, *United Mine Workers v. Illinois State Bar Association and United Transportation Union v. State Bar of Michigan, supra*, were cited and discussed at length in the briefs filed by appellants. The opinion below does not discuss, or even mention, those cases (which contain perhaps the most authoritative pronouncements by this Court, restricting the power of states to impair federal rights

under the guise of regulating the practice of law), but, instead preferred to rely upon the dissenting opinion of one member of a three-judge court in the United States District Court for Connecticut, in a case which did not involve federal rights.

(2) Appellants cited, in their briefs below, the many decisions of this Court, holding that substantive rights under federal statutes and maritime law cannot be altered or impaired by state law. (*Garrett v. Moore-McCormack Co., Pope & Talbot, Inc. v. Hawn, Beadle v. Spencer, Socony-Vacuum Oil Co. v. Smith, McAllister v. Magnolia Petroleum Company,* and *Kossick v. United Fruit Co., supra*).

The opinion below does not discuss or even mention those decisions. Instead, it relies for authority upon the one case cited on this point by amici curiae, *Missouri ex rel. Southern Ry. Co. v. Mayfield,* 340 U.S. 1 (1950). As the opinion below notes: "No brief on the merits has been filed for defendants by the Attorney General of Illinois who had previously appeared in their behalf." The *Mayfield* case simply holds that a state court is not required to grant a motion to dismiss, under the doctrine of forum non conveniens, an F.E.L.A. suit filed by a non-resident for an injury which occurred in another state. The state court can proceed to hear the case on the merits.

Of course, state procedure applies in F.E.L.A. and Jones Act cases, so long as substantive rights are not impaired; and no one was arguing to the contrary. That is why appellants employed Illinois licensed attorneys as local counsel in every case. However, it is difficult to understand how the *Mayfield* case (that a state court is free to hear a case or not) is applicable to the severe limitations upon the right of appellants to assistance of counsel of their choice, imposed by appellees; and that the other decisions (dealing with impairment of substantive rights), were not even deserving of mention.

(3) The only other case referred to in the opinion below was *Spanos v. Skouras Theatres Corporation, supra.* Appellants relied upon the majority opinion in which seven judges joined. The opinion of the court below prefers to rely upon the two judge dissent.

Finally, the opinion below suggests "the desirability of a more liberal exercise of discretion" by appellees, and concludes that "the Illinois statute is not unreasonable":

> "Nor in the present Madison County cases is the participation of out-of-state attorneys completely barred. They may be present and participate with local counsel, though that participation is limited."

Appellants' out-of-state counsel may be present in Court at trial. They can do everything except speak out loud to the court or jury! By the same reasoning, the N.A.A.C.P. in the *Button* case or the labor unions, in the *United Transportation Union, United Mine Workers* and *Brotherhood of Railroad Trainmen* cases, might have been admonished by this Court that the state statutes involved were not unreasonable because the penalties prescribed for solicitation did not include capital punishment.

CONCLUSION

This appeal raises issues of fundamental importance and far-reaching effect, regarding right of defendants to employ counsel of their choice in civil cases involving federal rights, and the power of states to restrict the participation of out-of-state counsel. Appellants, their requests for temporary relief having thus far been denied, are now being required to employ Illinois-licensed trial attorneys and to proceed to trial in F.E.L.A. and Jones Act cases in the Madison County Circuit Court. For the reasons stated, the questions presented in this appeal are so sub-